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ARGUMENT

OF

THE COUNSEL FOR THE UNITED STATES

IN THE

SUPREME COURT,

IN THE CASES OF

THE UNITED STATES,
vs.
GEORGE I. F. CLARK,
JOHN AND ANTONIO HUERTES,
JOSEPH M. HERNANDEZ, *et al.*

The right which Spain acquired by discovery and conquest on this Continent, was universally acknowledged and acquiesced in by all the Nations of Europe, and has never been denied by the Government of the United States.

According to the laws and policy of Spain, as well as the theory of the British Constitution, all vacant lands are vested in the Crown, as representing the Nation; and the exclusive power to grant them is declared to reside in the Crown as a branch of the Royal prerogative. (White's Compilation, page 41.)

The fee of the Crown could only be divested by the King himself, or by the persons to whom his power was specially delegated, and in the form and manner prescribed for their government.

The exercise of the granting power by any other person, or in any other manner, would convey no estate in the land to the nominal grantee; it would not divest the fee of the Crown, and would be to all intents and purposes, an absolute nullity.

The 6th section of the act of 1828 gives jurisdiction to the Superior Courts over all claims to land in Florida, embraced by the Treaty.

The terms "embraced by the Treaty," as employed in the statute, can include only those claims which the Treaty imposes an obligation on this Government to confirm.

The English version of the 8th article, has been rejected; and the Spanish version of the Treaty has been adopted, by the Court; and from a proper translation of the language used by the Spanish Minister, without regard to the language, understanding, and obvious intention of the American Negotiator, we must determine on the one hand, the rights secured to the people of the ceded Territory, and on the other, the obligations and responsibilities imposed on the United States.

According to the translation of the 8th article of the Treaty, as made by the translator of foreign languages for this government, "all grants of land made by his Catholic Majesty, or by his lawful authorities, before the 24th of January, 1818, in the said Territories, which his Majesty cedes to the United States, *shall remain ratified and confirmed* to the persons who are in possession of them, in the same manner that they *would have been*, if his Majesty had continued in the dominion of the said Territories." This clause of the Treaty contemplates perfect titles; titles given after the performance of all the conditions of the grant, either expressed or implied in law: grants which previous to the date of the Treaty, had been confirmed and ratified by the King, or by his lawful authority. Any grant not ratified and confirmed before the date of the Treaty, could not remain ratified and confirmed after the date of the Treaty. Until it had been ratified and confirmed, it could not *remain ratified and confirmed.* The confirmation must have had being, before it has continuance, and remainder. This appears to be the plain and natural interpretation of the 1st clause of the 8th article. But for a more perfect illustration of the intention of the Spanish negotiator, (and we will at present consider his intentions alone, without regard to the intentions of the other party to the contract,) it is only necessary for one moment to examine the laws and ordinances, rules and regulations, provided by the Spanish government, for the disposal of the Royal domain.

Until after the date of the Royal order of 1815, there was neither law, ordinance, or local regulation in East Florida, which authorized a grant of land for any other purpose, than that of habitation and cultivation.

This opinion is advanced with confidence, because the united efforts of numerous and learned counsel, in behalf of the claimants, in this and in the Court below, have been unable to produce any authority; and the Judge, although he decides otherwise, has been unable to refer to any such law, although specially required to do so in his decree, by the act of 1824.

The laws of the Indies, authorizing grants of land, forbid the investment of title in the grantee, until he shall have inhabited and cultivated the land during four years. (Law, 1 Liber, 4 Title, 12 page, 967, Land Laws. Law 2, Land Laws, page 968.)

If the grantee failed to comply with the condition of his grant, he acquired no right, and the land was granted to some other individual. (Law, 2 Land Laws, page 969.) One of those conditions was that the grantee should take *possession* of the land within six months from the date of the grant, and on failure to do this, he lost his right of occupancy.

When the condition was not expressed in the grant, it was nevertheless always understood:

"That all concessions in which no time is specified, shall become extinct, and shall be considered as null, if the persons to whom they are made do not take possession, and cultivate the same, within six months." (4th Article of the Regulations of the 12th October, 1803, found at page 1001 of the Land Laws.)

That this was the rule governing the grants in East Florida, is fully shewn by the opinion of Don Ruperto Saavedra, Judge of the Province, given on the 27th October, 1818, at the instance of the Agent of the Duke of Alagon.

In the 7th Article of his Report, found at page 252 of White's Compilation, he says, "That the concessions made to foreigners, or natives of large or small portions of land, carrying their documents with them, (which shall be certificates issued by the Secretary,) without having cultivated, or even seen the land granted them; such concessions are of no value or effect, and should be considered as not made, because the abandonment has been voluntary, and they have failed in complying with the conditions prescribed for the encouragement of population."

Had Florida remained under the dominion of Spain, the grant to the Duke of Alagon would have been valid, and other grants within its limits would have been subjected to the rule above mentioned.

The first article of the instructions given to the Surveyor, George Clark, found at page 1003 of the Land Laws, shews the distinction taken between perfect and imperfect titles to land in East Florida:

"The possessors of lands in this province shall be considered under three classes: 1st. as proprietors. 2d. as grantees; and 3d. as grantees and proprietors.

"The first are those who hold lands by titles not obtained by grants from the government. (These were English inhabitants who remained in the Province after the treaty of 1783, and who held lands by patent from Great Britain.) "The second are they who on compliance of certain conditions of time and labor, *will get* titles of property. And the third are those who *have acquired those titles.*"

The following opinion of the notary of government of the royal domain, whose duty it was to countersign all complete grants under his official seal, will further shew the distinction between a complete and an incomplete grant, and will shew the usage and custom of the Province until the month of October, 1818, the time when it bears date. It will be found at page 250, of White's Compilation.

"As I best can and ought to do, I certify and attest that the conditions prescribed by this government for grants of land to which the decrees of the 2d inst. placed on the proceedings refer, are the same which appears in the foregoing title delivered in favor of Don John McQuin, dated on the 12th of March, 1804, which conditions subsisted in all their force until the year 1815, when the then governor of this place Brigadi Don Sebastian Kinderlan altered them at his discretion, granting lands under the *single circumstance* that when

the *grantee proves that he has cleared them, built houses, fences, and other things necessary for the improvement of a plantation*, the title of proprietorship should be delivered to him, as has been done to several who have not passed the ten years' possession pointed out in said title of McQueen, as appears from the different proceedings in the archives in my charge to which I refer; and in compliance with orders in said decree, I sign and seal these presents in St. Augustine, &c. October, 1818."

The regulations of Gov. White required ten years' residence to enable the grantee to obtain a perfect title. Gov. Kinderlan in 1815 altered this regulation, and granted the land in absolute property in proportion to the working hands each family possessed, whenever they could prove satisfactorily that they had performed the conditions of "*clearing land, building houses, fences, and other things necessary for the improvement of a plantation.*" This alteration appears to have been the only one made by Gov. Kinderlan, as the largest grant confirmed by him or his predecessors up to, and inclusive of the year 1815, was the grant to McQueen, for 3,275 acres, and that on proof of the number of his family and slaves, and of his having complied with the conditions of cultivation and improvement.

The royal order of 1735 required that all perfect titles should be given by the king, after the grantee had performed the four years' residence and cultivation required by the laws of the Indies. To remedy the inconvenience arising from this regulation, the royal order of 1754, found at page 973 of the Land Laws, was issued, which vested the power of appointing sub-delegates and judges for the disposal of the royal domain, in the presidents and vice roys of his American dominions. The 5th article of the royal order authorizes the confirmation of all imperfect grants where the grantee had complied with the conditions of the grant, and where the quantity claimed was no more than the party was entitled to.

By the 81st article of the Ordinance of 1768, the power of granting and confirming titles to land was vested in the intendants. (See Land Laws, 972.)

The royal order of 1774, repealed this article of the Ordinance of 1768, and conferred the granting power on the civil and military governors. The royal order of the 22d of October, 1798, so far as it regards the provinces of Louisiana and West Florida, invested the intendant with full and exclusive power to grant "all kinds of lands," (see White's Compilation, 218.) In East Florida, the royal order of 1774 remained unrepealed in every particular, and the granting power continued to be exercised by the governors of that province.

From the preceding laws, ordinances, royal orders, and official reports, the Court will readily perceive the difference between a title in full property, and an inchoate title, where the fee is yet in the crown, and to be divested only on the performance of a condition precedent to the estate; the difference

in the language of the treaty between a grant *ratified and confirmed*, and a grant to be ratified and confirmed, after the performance of the conditions of habitation and cultivation.

This difference will be still more fully illustrated by a comparison of the form of the imperfect title, which was always given in the first instance, with the perfect, or "ratified and confirmed" title, given after the performance of all the conditions of the grant. The imperfect title consisted always of the petition of the grantee, and the order or decree of the governor, under which the party was permitted to take possession of the land, and to enjoy its use and possession until by his habitation and cultivation during the time prescribed, he became entitled to have his grant confirmed. The petition and decree or order of the governor, found at pages 6 and 7 of the Record, in the case of the U. States, *vs.* John Huertus, No. 82, presents the ordinary form of an inchoate title, or a title intended afterwards to be confirmed when the conditions should have been performed, with the exception of the following words, which are altogether unusual. "With the precise condition to use the same for the purpose of raising cattle, without having the faculty to alienate the said tract either by sale, transfer, contract of retrocession, or by any other title in favor of a stranger, without the knowledge of this government." These unusual and extraordinary restrictions, prove the intentions of the governor to have been, only to grant the use and occupation for the purpose of "*raising cattle,*" and not to give the incipient title, afterwards to be matured into a perfect grant.

At page 8, of the same record, will be found the form of a perfect title, or a "ratified and confirmed" title, such as could only be given after the performance of the conditions, either expressed in the imperfect grant, which it is intended to confirm, or implied in law. The Court will perceive by comparison, that the concluding part of this instrument conforms almost literally to the latter clause of the 5th article of the royal Regulation of 1774, found at page 974 of the Land Laws, which provides, that "the confirmation of the patents of the possessors of these lands shall be given in my royal name, by which their property and claim in the said lands shall be rendered legal."—That this royal order and the several laws of the Indies, to which it relates in the 2d article, and found from page 967 to page 971 of the Land Laws, were in force in East Florida, we have the most conclusive proof furnished by the royal Order of the 8th of June, 1814, found at page 1010 of the Land Laws. By the latter order the king commands the royal Order of 1754, and the laws of the Indies to be observed and obeyed.

The Court is respectfully referred to those laws and those royal orders, which, with the royal orders of 1790, and 1815, and the local regulations founded upon them, formed the entire code and system for granting lands in

East Florida. All grants made and confirmed according to these laws, royal orders, and local regulations, are according to the decision of the Court in the case of Arredondo and son, confirmed by the Spanish version of the treaty.

All grants made in contravention of these laws, royal orders, and local regulations, are made without authority. They are not made by the "lawful authorities of His Catholic Majesty," and were therefore void before, and cannot have been ratified and confirmed by the treaty.

Having shewn that the terms, "shall remain ratified and confirmed," as expressed in the first paragraph of the 8th article of the treaty, can be applicable only to those grants which had been confirmed by the Spanish government before the time limited in the treaty; and having shewn from the laws and usages of Spain, what is the nature and form of such a grant; we are now the better enabled to discuss the nature of an imperfect title, and to decide what rights the grantee had under it, and what responsibility was imposed on the United States to confirm those grants.

The following is the language of the last clause of the 8th article, which expresses, very clearly, the intention of the Spanish negociator, at the same time it shows the nature of the imperfect titles, intended to be confirmed on the occurrence of the contingency, on which the right of confirmation might be claimed by the grantee. "But the proprietors, who, in consequence of the circumstances in which the Spanish nation has found itself, and the revolutions of Europe have not been able to fulfil all the obligations of their grants, shall be obliged to fulfil them according to the conditions of their respective grants from the date of this treaty, in default of which they shall be null and void." Without perverting the terms employed, and distorting the obvious intention of the negotiator, this clause of the treaty cannot be made to apply to any other than imperfect titles, grants made on conditions, which remained to be performed, at the date of the treaty, and which, until the performance of those conditions, entitled the grantee to no estate in the land. It cannot be so construed as to confirm any imperfect grants by its own action, but imposes an obligation on this government to confirm them, provided the conditions shall have been performed by the grantee within the time specified in the same clause of the treaty.

It proves, as do the laws, ordinances, and royal regulations of the Spanish government, that all these grants depended on conditions precedent, and with them as with us, the condition must be performed, the contingency must occur, before the estate can arise or take effect. If all the conditions be performed within the time specified in the treaty, an obligation is imposed on the United States by the treaty to confirm the title. If all the conditions be not performed within the time stipulated, then the grant is by the force and effect of the laws of Spain no less than by the express provision of the treaty forever "null and void."

The first and second clause of the 8th article of the treaty when taken and construed with each other according to the translation of the Spanish version, ratifies and confirms all grants ratified and confirmed by His Catholic Majesty, or his lawful authority, before the 24th of January, 1818, and it imposes an obligation on the American government to ratify and confirm all imperfect grants made by his Catholic Majesty, or his lawful authorities, before the 24th of January, 1818, to the same extent that they would have been valid, or in the *"same manner that they would have been,"* (ratified and confirmed,) "if his Majesty had remained in the dominion of the territories."

If the Spanish word *'concesiones'* be translated concession, instead of grant, it cannot vary, in the most remote degree, the construction given to this article of the treaty. In technical phrase there is with us a difference between concession & grant. The one generally implies an imperfect, the other a perfect grant. But the term as expressed in the first and second clause of the 8th article can only mean the grant or the title which the claimant may have. If rendered "concession," in English, and understood to mean imperfect titles which had not been confirmed by the Spanish government, then they could not remain ratified and confirmed, because they must have been confirmed and ratified before they can so remain. If they are ratified and confirmed concessions, they are perfect grants, by which the Crown has been divested of the fee, and they remain ratified and confirmed by the treaty. The Court will then perceive that the language of the 8th article of the treaty gives the best explanation of the term *"concesiones,"* and shews that it was intended by the Spanish negociator to signify, grant or title, perfect or imperfect, or the land granted, as its meaning is varied by other terms with which it is associated in the first and second clause of the treaty. When it speaks of a concession which shall remain confirmed, it means a title which has been confirmed; and when it speaks of a concession to be confirmed on the performance of certain conditions, it means an imperfect or inchoate grant or title.

With this understanding of the 8th article of the treaty, and the distinction and manifest difference between confirmed grants or titles in full property by which the Crown was divested of the fee and imperfect titles where the party had obtained only the first decree by which he went into possession of the land, when he was merely progressing in the performance of those conditions imposed by law. and where the fee still continued in the Crown, as we have shewn by the laws and usages of Spain, and the form of the respective titles given in either case, we shall be prepared to decide what lands were conveyed to the United States, and what lands were confirmed to the inhabitants of the ceded territory by the stipulations of the 8th article of treaty.

The treaty conferred no new or additional right of soil on the inhabitants of the ceded territory, it only secured those rights to the same extent that they had been conferred by the government of Spain. The United

States found them as they had been left by Spain. Some with perfect titles to the soil, granted by the lawful authority of His Catholic Majesty. Some with inchoate titles, to be perfected after proof of performance of the conditions of the grant; and others with titles formal and informal, not made by the lawful authorities of His Catholic Majesty or any other than the self-created authority of the officer by whom they were made in anticipation of the change of Government, and his relief from responsibility.

If then, as we think, we have abundantly shown that in no case the fee of the Crown was divested, until after the performance of the conditions of the grant, and then, only by that formal deed or grant prescribed by the 5th section of the royal order of 1754, found at page 974 of the Land Laws; and, according to the 18th article of the regulations of Morales, found at page 984 of the Land Laws, which refers to other preceding articles that contain the same provision, and declares that no one of those who have obtained the first decree or imperfect title, "notwithstanding in virtue of them, the survey has taken place, and that they have been put in possession, can be regarded as *owners* of land until their *real titles are delivered, complete with all the formalities before recited,*" it must follow as a natural result, that the fee in all lands within the ceded Territory, not embraced in *real titles* or formal and complete titles passed to the United States by virtue of the Treaty. The estate must rest some where. The King had not conveyed it to the claimant, he held it as a security for the faithful performance of the conditions on which it was to be given; and if it did not vest in the United States by virtue of the Treaty, the King of Spain is yet the proprietor of millions of acres of land in a Territory which he declares in the 2d article of the Treaty he cedes in full property and sovereignty to the United States.

We think, then, that the United States is invested with the fee in all lands claimed by imperfect titles, or illegal titles from the Government of Spain; that when the claimant under these imperfect titles made by the lawful authority of his Catholic Majesty shall prove a compliance with the conditions of his grant within the time prescribed by the laws of Spain, and the Treaty, the United States will be bound to confirm his title to the same extent that such title would have been valid under the Government of Spain.

The nature of those conditions, and the time within which they must be performed, can only be determined by the laws under which they are imposed, and the provisions of the Treaty by which they are recognized and required to be performed.

A Treaty is a contract between two nations, and may, in many respects, be construed by the rules which govern contracts between individuals. The intention and understanding of the parties, is to be sought in the language in which they have contracted with each other; and they are only bound to the extent of their understanding and intention in creating the obligation.

The 8th article of the Treaty imposes an obligation on the United States. She contracted in her own language, and is responsible to the full extent of the obligation which she created, and to which she assented in the negotiation. But can she be responsible under a contract not understood, and to which her consent was never given?

On this subject, Vattel observes, at page 310:

"But it is asked, which of the contracting parties ought to have his expressions considered as most decisive, with respect to the true sense of the contract, whether we should stop at those of the power promising, rather than at those of him who stipulates? The force and obligation of every contract arising from a perfect promise, and he who promises, being no farther engaged than his will is sufficiently declared; it is very certain, that in order to know the true sense of the contract, attention ought principally to be paid to the words of him who promises; for he voluntarily binds himself by his words, and we take for true against him what he has sufficienctly declared."

It is provided in the English version of the 8th article of the Treaty that "all grants of land made before the 24th of January, 1818, by his Catholic Majesty, or by his lawful authorities in the said Territories, ceded by his Majesty to the United States, shall be ratified and confirmed to the persons in possession of the land to the same extent that the same grants would be valid, &c." This is the obligation imposed by the contract, and which, in good faith she is bound to observe. That which is sought to be enforced against her is written in a language which she did not comprehend, and to which her assent was never given. It is according to the translation of the Spanish version of the 8th article of the Treaty, "all grants of land made by his Catholic Majesty or by his lawful authorities, before the 24th of January, 1818, in the said Territories, which his Majesty cedes to the United States shall *remain ratified* and confirmed to the persons who are in possession *of them*, in the same manner, &c." The term "*them*" refers to the "*grants of land,*" and it is contended that the United States are bound under this stipulation to confirm the grants to the persons in possession of *them*, (the grants,) instead of the persons who are "in possession of the lands;" according to the express stipulation made in the English Language. If thus understood they are separate and distinct obligations; they impose responsibilities essentially different from each other. The United States are not bound by both, and the question arises, which of them her national faith is pledged to redeem? She can only be required to execute her contract: her contract is to confirm the "grants of land" to the persons in possession of the "*lands,*" and not to confirm the *grants of land* to the persons in possession of the *grants or title papers*. It is believed to be a rule in diplomacy, and one invariably observed by all civilized nations, to negotiate in their own language, and to be bound only by the contract expressed in that language. If this

principle be correct, then it is obvious that the United States are not bound to confirm the grants or titles to the persons in possession of "*them*;" but to confirm the grants to the persons in "*possession of the land*."

The 11th article of the treaty provides, that the United States shall pay to our merchants, on account of spoilations committed on our commerce, a sum not exceeding five millions of dollars. This obligation is clearly expressed in the English language, and shows the will and intention of the negotiator, by which the nation is bound. Suppose in the Spanish version of the same article, when translated into English, it should be found that the stipulation was to pay the five millions to the king of Spain, would any one seriously contend that the United States are bound to pay this money to the king of Spain, or to pay it to any other person, or in any other manner, than she had promised to pay it? The cases are parallel, and the reasons the same. The government has the same legal right in a controversy with individuals, that it would have in a controversy with a foreign nation, and the treaty must be construed according to the same rules.

There are other reasons why the English version of the Treaty should prevail, and be in force. It expresses, beyond doubt, the understanding and intention of both the contracting parties, at the time of the negotiation; as is fully shewn by the following extract from the correspondence of Mr Adams, Don Onis and M. de Neuville. Executive Papers—Vol. 1—p. 46, 68, 69;—1819, '20.

The minutes upon the 8th article, compared with the draft in the project of Mr de Onis; with that of the counter project by the Secretary of State, and with the article as finally expressed in the treaty, fully elucidate the understanding of the parties, that the grants of land, dated before, as well as after, the 24th of January, 1818, were annulled, excepting those upon which settlements had been commenced; the completion of which had been prevented by the circumstances of Spain, and the recent revolutions in Europe.

M. de Neuville's particular attention is requested to the difference between the two projected articles, because it will recall particularly to his remembrance the point upon which the discussion concerning this article turned. By turning to the written memorandum drawn up by Mr de Neuville himself, of this discussion, he will perceive he has noted that Mr de Onis insisted, "that this article could not be varied from what was contained in the chevalier's project, as the object of the last clause therein was merely to save the honor and dignity of the sovereignty of his Catholic Majesty."

It was then observed by Mr Adams, that the honor and dignity of his Catholic Majesty would be saved by recognizing the grants prior to the 24th of January, as "valid to the same extent as they were binding on his Catholic Majesty," and he agreed to accept the article as drawn by Mr Onis, with this explanation (see Mr de Neuville's memorandum.) It was on this occasion that Mr de Neuville observed that if the grants prior to January 24, 1818, were confirmed only to the same extent that they were binding on the king of Spain, there were many *bona fide* grantees, of long standing, in actual possession o ftheir grants, and having actually made partial settle

ments upon them, but who had been prevented, by the extraordinary circumstances in which Spain had been situated, and the revolutions in Europe, from fulfilling all the conditions of the grants; that it would be very harsh to leave these persons liable to a forfeiture, which might, indeed, in rigor, be exacted from them, but which very certainly never would be if they had remained under the Spanish dominion. It will be well remembered by Mr de Neuville how earnestly he insisted upon this equitable suggestion, and how strongly he disclaimed for Mr Onis every wish or intention to cover, by a provision for such persons, any fraudulent grants. And it was then observed, by Mr de Neuville, that the date assumed of 24th of January 1818, was not sufficient for guarding against fraudulent grants, because they might be easily antedated. It was with reference to these suggestions of Mr de Neuville, afterwards again strenuously urged by Mr de Onis, that the article was finally modified as it now stands in the treaty, declaring all grants subsequent to 24th January, 1818, absolutely null, and those of prior date valid to the same extent only that they would have been binding upon the king, but allowing to *bona fide* grantees, in actual possession, and having commenced settlements, but who had been prevented by the late circumstances of the Spanish nation and the revolutions in Europe, from fulfilling *all* the conditions of their grants, time to *complete* them. It is needless to observe, that, as these incidents do not apply to either of the grants to Alagon, Punon Rostro, or Vargas, neither of those grants is confirmed by the tenor of the article as it stands: and that it is perfectly immaterial in that respect, whether they were dated before or after the 24th of January, 1818, it being admitted, on all sides, that these grants were not binding upon the king, conformably to the Spanish laws. The terms of the article accord precisely with the intentions of all the parties to the negotiation and the signature of the treaty. If the dates of the grants are subsequent to the 24th of January, 1818, they are annulled by the date; if prior to that date, they are null because not included among the prior grants confirmed.

This shews the sense in which the term *grant* was expressed and understood, by Don Onis, and it shews the persons who were intended to be embraced by the Treaty. It was not those persons who had obtained conditional grants, who held "them" in possession, and had now settled on, or even seen the land granted to them; but *bona fide grantees* of *long standing*, *in actual possession of their grants*, and having *actually made partial settlements upon them*, but who had been prevented by the extraordinary circumstances in which Spain had been situated and the revolutions in Europe, from fulfilling all the conditions of their grants.

No one can read this correspondence and resist the conviction, that it was the intention of both parties to the negotiation to provide for the confirmation of grants to the persons in possession of the land, and that by the possession of the *grants*, was meant the *possession of the land*. To use the expression in any other sense, would involve an absolute absurdity. In propriety of speech we could not say, that a person had actually made partial settlements upon the grants, unless we understand by the term grants, the lands granted, instead of the title papers. As this is evidently the sense in which it was understood in the correspondence, we may naturally infer that the same terms, were understood in the same manner when afterwards adopted by the same parties in the treaty.

The letter and spirit of the whole of the 8th article of the treaty, both in the English and Spanish languages, give further proof that such was the intention of the parties. The terms of the treaty, as well as the laws of Spain, to which we have already invited the attention of the Court, shows that the grants were made on conditions precedent. These conditions, were, that the grantees should according to the 4th article of the regulations of 1803, found at page 1001 of the land laws; take possession and cultivate the land granted to them within six months from the date of the grant, and on failure to do so, that the grant should be void. Habitation and cultivation being the condition required by the laws of Spain, as well as by the treaty; and as the grantee could not inhabit or cultivate without being in possession of the land, it is self-evident that the treaty required the claimant to have been in possession of the land, and in progress with the performance of the conditions, on which his confirmation of title might be acquired.

Except in the few cases where grants were made for military services under the royal order of 1815, all the grants legally made in the Province of East Florida, were in consideration of habitation and cultivation, to be performed by the grantee. Under the Government of Spain, those persons would not be entitled to the land until they proved a performance of all the conditions of the grant. The Treaty places them under the Government of the U. States on the same conditions: and to say the possession of the title papers or grants, shall be substituted for the possession, habitation and cultivation of the land, required no less by the Treaty than by the laws of Spain, is to defeat both the Treaty and the law, and to confirm titles to millions of acres of land, which under the Spanish Government would never have been confirmed.

There is now, and has been in suit in the Courts of Florida more than ten times the quantity of land to which confirmed titles were given by the Spanish Government, and where the claimants are in possession of the grants or title papers without ever having seen the land which they claim.

The conditions imposed by the laws and usages of Spain and enforced by the Treaty, were not, that the claimant should have possession of his grant or title papers, for copies of those, duly certified, were always given to him at the time of making the concession; but that he should enter into possession of the land, should cultivate and improve it, and make it his home for four years at least, to entitle him to a grant in fee simple.

The truth of this proposition is fully shown by the following Laws of the Indias, found at page of the Land Laws 968: "to those who shall have lands and lots in the new settlement of any Province, there shall not be granted or distributed any lands in another Province, unless they shall have left their first residence, and proceeded to reside in the new settlement, except they *shall have continued the four years, necessary* to acquire *property*

in the lands, &c.;" "and we declare, the alotment of lands made contrary to the provisions of this, our law, to be null." As a further evidence that the conditions required to be performed by the Treaty, were possession, habitation and cultivation, the Court is respectfully referred to laws 1, Title 12, book 4, 2d vol. of the laws of the Indias, a translation of which is found at page 967 of the Land Laws, which provides that "after a residence in those settlements (referring to the settlement required by the preceding part of the same laws to be made on the land by the grantees) for four years, and labor therein, we grant them power thereafter to sell their possessions, or dispose of them at pleasure as their own property."

We have already shown by the royal order of 1814, that these and other laws containing the same provisions, were in force in Florida. That until after the receipt of the royal order 1814, ten years' habitation and cultivation were invariably required before the grantee could acquire a title to the land in full property. That in the year 1815, according to the statement of Entralgo, Notary of Government, found at page 250, White's Compilation, Governor Kinderlan altered the regulations of Governor White, of the year 1803, which required ten years' habitation and cultivation, and "granted lands under the single circumstance that when the *grantees proved that they had cleared them, built houses, fences, and other things necessary for the improvement of a plantation*, the title of proprietorship should be delivered to them." This appears to have been the custom ever after, until 1818. Entralgo states that this alteration was made at the discretion of Governor Kinderlan; but the court will perceive from the time when the alteration was made, that it was under the royal order of the 8th of June, 1814, addressed to the Governor of St. Augustine, (the same Sebastian Kinderlan,) who made the alteration, commanding him to obey the laws of the Indias and the royal order of 1754 in all things relative to the distribution of lands. This royal order shows, not only that the laws above referred to, were in force in East Florida, but it shows the limited discretion of the Governor, and the laws themselves show the limited power conferred on him in making grants of land.

In the case of Purcheman, 7 Peters, page 87, the Court remarked, "had Florida changed its sovereignty by an act containing no stipulation respecting the property of individuals, the right of property in all those who became subjects or citizens of the New Government, would have been unaffected by the change." This just and equitable principle is not controverted by the Counsel for the United States: on the contrary, it is that for which they contend. We received the people of the ceded Territory with the same "*right of property*," and none other than that, which they possessed under the former Government. And the question arises, what is the nature of that right? This Court has ever decided, that the right of property in land, must be determined by the laws of the County where the land is situ-

ated. The law, therefore, must be produced, and by the law individual rights must be determined. We have already referred the Court to the laws of Spain, and we have endeavored to show from those laws, that no grants of land in Florida, other than those authorized for military services by the royal order of 1815, could have been made, except in proportion to the ability of the grantee to cultivate and improve them, and on condition of actual habitation and cultivation. We have endeavored to show by those laws, and we think not without success, that no "*rights of property*" in land, was conferred on the grantee, until after the performance of all the conditions of the grant, on proof of which a title in full property or "real title," divesting the crown of the fee, was made out and executed under the hand and seal of the proper officer, and delivered to the grantee. The grant or concession given in the first instance, was ever on conditions precedent, leaving the fee still in the crown, and not to be divested until after the performance of all the conditions. We have shown that the practice of the Province conformed to these laws at least until the year 1816, without the least variation; that it was continued after that time until October, 1818, [see White's Com. page 250,] which creates the strongest presumption against the validity of any grant not made in conformity to those laws, and the long continued practice under them: a presumption only to be rebuted by producing the authority of the officer by whom the grant is alleged to have been made, not in conformity with that practice.

With this understanding of the laws of Spain, and the unvaried practice of the Provincial Government under those laws, until after Don Onis had been commissioned by the King of Spain, to negotiate with the American Government for the cession of the Floridas, we cannot be at a loss in understanding what was ceded to the United States, and what is meant by the term "*vacant lands*" in the 2d article of the Treaty. The terms "*vacant lands*" is well understood to mean the lands of the crown, laws 14, Title 12, book 4 2d vol., page 42 of the laws of the Indias, a translation of which is found at 969 of the Land Laws, declares "that all lands and soil that have not been granted away by the kings our predecessors or by us in our name, belong to our patrimony and royal crown."

No land or soil was granted in cases of imperfect titles, when the right of property and of soil was withheld until after the performance of the conditions prescribed by law, and the lands in all such cases, were vacant lands, and passed to the United States; but the claimant came with the lands, under this government, with the same right to consummate his title by a performance of the conditions imposed by law, that he had under the government of Spain. According to the decision of this court in the case of Percheman, page 87, without the stipulated protection of the treaty, his right of property would "have been unaffected by the change." "It would have remained

the same as under the former government." It does remain the same as it was under the former government by the 8th article of the treaty which provides that such claims shall be ratified and confirmed to the persons in possession of the land to the same extent that the same grants would have been valid if the territories had remained under the dominion of his Catholic majesty." The fee not having vested in the grantee before the treaty, it must have passed to the United States as vacant land charged with the incipient right of the claimant, under an obligation to perfect that right, and convey the estate in fee simple, after the performance of the conditions, or the fee is still in the Crown of Spain. Nor is this view of the subject changed in the smallest degree by the enumeration of what is ceded in the 2d article—"the adjacent islands dependent on said provinces, all public lots and squares, vacant lands, public edifices, fortifications, barracks, and other buildings, that are not private property." It never has been contended that private property was conveyed by the treaty. The king professes to cede only that which belonged to him, and the government claims nothing more. Private property reserved in the enumeration refers not to vacant lands, public lots and squares, public edifices, fortifications, and barracks; these, from their very terms, shew that they were not private property; that they were public property, or property of the Crown. But "private property" refers to "buildings." The king ceded all that he had, either of soil or sovereignty, and among other things, "*all buildings*" that were not "*private property.*"

In the case of Percheman, at page 88, 6 Peters, the Court in remarking on the difference between the English and Spanish versions of the 8th article of the treaty, observe, "if the English and Spanish parts can, without violence be made to agree, that construction which establishes this conformity ought to prevail." From what we have already observed on the subject, it will be shewn that this conformity of construction may be given in all points presented under that article, which affect materially the interest of the parties. We make this qualification, because we deem it quite unimportant, whether the complete grants, executed with all the legal formality necessary to convey the fee in the land, be considered ratified and confirmed by the action of the treaty, or whether the treaty requires them to be confirmed. In either case, if the grant was made before the 24th of January, 1818, by his Catholic Majesty or his lawful authority, the land was private property at the date of the treaty, and the government has no interest in it. And in neither case can the right of enquiry be denied, whether the officer had power to make the grant. This is the first question presented in every case, and if the Court is satisfied that the power has been legally exercised, it must give a decree of confirmation, and if it be not satisfied, the claim must be rejected.

But the other technical varience suggested, is of a more important character, and which, if not reconciled, must operate with peculiar injustice to the

government, and defeat the spirit and design of the 8th article as expressed in both languages. That article was intended to save tho validity of grants made by the government of Spain to the same intent and no further than the same grants would have been valid under that government, if Florida had not passed under the dominion of the United States. The English version requires a confirmation to that extent, to the persons *in possession of the land;* the Spanish version requires a confirmation to the same extent, to the persons *in possession of the grants.* By considering the term grants, as signifying the land granted, as it was most certainly considered by the negociators of the treaty, as shewn by their correspondence, then the English and Spanish versions of the treaty will correspond with each other, and impose the same obligation on the government of the United States. Both will require the confirmation of grants made by his Catholic majesty or his lawful authorities to the same extent that they would have been valid under the former government. If, however, we construe the "possession of the grants" to be the mere possession of or custody *of the title papers*, as contended, then the grants must be confirmed to a greater extent than they would have been valid under the former government. The treaty, in requiring the performance of conditions, evidently contemplates the conditions prescribed by the laws of Spain, and the performance of which must have been precedent to an estate in land. Those conditions were not, as we have shewn, the possession of the grants, unless we understand by that term, the possession of the *land granted.* It was not one of the conditions that the claimant should be in possession of the title papers, but that he should be in the actual occupancy, and cultivation of the land.— In common speech, the term grant is a figurative expression, from which, in one sense, we understand the land granted; nothing is more common, and nothing better understood,and the sense in which it is intended to be regarded, is to be sought in the expressions with which it is associated. On this subject, Vattel, at p. 315, sec. 278, remarks, "There are figurative expressions, become so familiar in the common use of language, that they take place on a thousand occasions of the proper terms, so that we ought to take them in a figurative sense, without paying any attention to the original, proper, and more direct signification. *The subject of the discourse sufficiently indicates the sense that should be given to them.*" According to this rule of interpretation, the *possession of the grant* in the Spanish version of the 8th article of the treaty, can, without 'violence,' be construed to agree and correspond with the possession of the land granted, as expressed in the English version of the same article. "The subject of discourse," as expressed in that article, in both languages, shews this to have been the sense in which it was understood. The condition required to be performed by both, was habitation and cultivation. Actual possession of the land was an essential prerequisite to habitation and cultivation. If we dispense with the first we cannot require the second,

although it constitutes the entire condition required by the language of both the contracting parties, and without the performance of which, both declare the grant to be null and void. If we reject this interpretation, then we depart from all the well established rule of construction; we do not arrive at the intention and understanding of the parties, from what they have said on the subject: but we take one isolated expression of one of the parties, and give it a meaning by whichthe whole force and character of the contract is perverted. If we construe the term possession of the grant,in the translation from the Spanish version of the 8th article, to mean the possession of the title papers, then that term not only defeats the stipulation of the English version, which requires the possession of the land, but it destroys the spirit and letter of the residue of the article, in the language in which it is written.

The interpretation for which we contend, restores harmony and correspondence between the Spanish and English versions of the 8th article of the treaty, and agrees with the letter and spirit of both. We believe it will be adopted by the Court, and that in all cases in which the crown of Spain had not been divested of the fee, by a grant in fee simple, made by *his Catholic Majesty in his lawful authority,* the first inquiry will be, was the party in possession of the land at the time contemplated by the treaty; and secondly, has he performed all the conditions required by the treaty and the laws of Spain? if he has, his title must be confirmed, if not, it must be rejected.

When the party had acquired a perfect title, after the performance of all the conditions expressed or implied, the laws of Spain did not require him to remain in possession. The land was his in full property, and he could do with it as he thought proper. The treaty requires no more than was required by the laws of Spain, and the United States require no more than is required by the treaty. The law and the treaty are the tests by which the rights of the United States, and the rights of her adopted citizens are to be determined.— The Court will administer the law, and the law will dispense justice.

But if the fixed and stable principles of the law are to yield to the vague and uncertain presumption drawn from the exercise of power unknown to the law; if we are to presume the law to which we have referred the Court, repealed, because the act of the office is contrary to the law; if we are to presume the existence of other laws,in order to sustain the exercise of the granting power; then the law may not be administered, and justice may not be done. If the law as known and understood commands one thing, and another be done, apparently contrary to law, we ask whether the natural presumption arising from such premises, be not in favor of the supremacy of the law, and against the validity of the act? If it be as we believe it is, we respectfully submit to the Court, whether both the presumption and the law be not opposed to the claim of each of the present petitioners. We further most respectfully ask of the Court, whether the royal order of 1790, which consti-

tuted the only authority, and under which all grants professed to have been made, except those for military services, and which authorized "grants of land to be *made in proportion to the working hands each family may have*" will authorize a grant for fifteen, twenty, and twenty-six thousand acres of land, when the petitioners, by their own showing, prove that the grants were not made "*in proportion to the working hands they had.*" And we ask, whether any other authority, save the apparently illegal act of the officer making the grant, has been produced in favor of the claims presented, and professing to have been made under this royal order?

We make the same enquiry with regard to the claims presented for military services, all of which expressly profess to have been made under the royal order of the 29th of March, 1815, which appears to have been the only authority delegated by the king for that purpose, and we ask, whether the provisions of this order which effectually limits the exercise of the granting power in favor of the soldiers of the three companies of white militia, of the city of St. Augustine, and the married officers and soldiers of the third battalion of Cuba, can be extended so as to include persons, who, by their own shewing, prove beyond the existence of doubt, that they were not soldiers, or married officers of either of those corps? And we ask whether the royal order providing in express terms for a grant of only "a certain quantity of land as established by regulation in this Province, agreeably to the number of persons composing each family," can be so construed as to confer authority on the Gov. of the Province to grant 25,000 acres of land to one not embraced in this royal order, and who shews that he did not receive the grant agreeably to the number of persons composing his family, and according to the quantity established by regulations in this Province?" The regulation referred to is found at page 1001 of the land laws, and authorizes a grant of fifty acres of land to each head of a family, and 25 acres for each child or slave above the age of sixteen years, and fifteen acres for each child or slave between the age of eight and sixteen years. To have authorized a grant of land for 25,000 acres under the royal order of 1790, and 1815, the family of the grantee must have consisted of *nine hundred and ninety-eight persons above the age of sixteen years.* This extraordinary possession is a fact in the absence of all proof which cannot be presumed, to sustain the granting power, which appears independently of this to have been illegally exercised. The royal order of 1815, proves that the regulation of the province to which it refers was in force, and must have continued in force as long as the order by which it was adopted, for it became and by adoption constituted an essential part of that order. The grants themselves by referring to this royal order as the source of power under which they were made, prove that it was in force at their respective dates, and that the governor who made the grant, considered that he had neither power nor discretion beyond that conferred by this order to make a grant

for military services. This proves, most conclusively, that no other law, ordinance, or royal order could have been in force at the same time inconsistent with the provisions of the royal order of 1815. The same remarks are applicable to the royal order of 1790, and the same results ensue. The Court will find, on examination, that each of the grants refer to one or the other of these royal orders as constituting the power of the governor to make the grant. His express reliance on this source of power repels the presumption that these orders were repealed, or that there were other grants of power which he might legitimately have exercised. We have then the evidence of Governor Coppinger himself to prove, that these royal orders were in force; that in making the grants he acted under them; and if according to the ordinary rules of construction, these royal orders do not sustain the authority of the governor in making the grant; then it must follow that they were made without authority, and are therefore void.

In the case of Soulard and others, the Court observed, it was important, in order to make a satisfactory decision of the case that the power of the officer to make the grant, should be produced. That case has been postponed three years, for the production of this authority. The cases now under consideration have been pressed on the Court by the learned Counsel of the Petitioners, and a decision required. If, after the unremited researches of ten years, with all the facilities and assistance given by the Government, they have been unable to find the least authority for making grants of this magnitude, and they still persist in having a decision, it would seem that the decision should be against the validity of the grants.

The time when made, no less than the quantity of the land embraced in the grant, and the persons to whom they were made, all concur in creating a presumption of fraud designed against this Government. They were made in anticipation of the transfer of the Province to the U. States. They were made about the same time with those of the duke of Alagon and others, which Don Onis admits were fraudulent and a disgrace to his country. When we have detected the fraudulent design of the Monarch himself, in exercising the granting power; when we have compelled him to revoke the grants which he had fraudently made; can we give greater faith and credit to the acts of his subordinate officers than we give to his, and greater than we are required, by the treaty, to give to the requisitions of the laws and ordinances of Spain?

The Court will find, on examination, that Don Onis was commissioned by the King to negotiate with the American government, in September, 1816. And it will find by an examination of the transcript from the archives of East Florida, that there was near ten times the quantity of land granted in the year 1817, and from that time until the year 1821, than had been granted, previously, during the whole period of the occupation of that Province by Spain, commencing in the year 1783.

The position taken by the learned Counsel in the several cases now be-

fore the Court is worthy of remark. He says, "The grantees whose names are herein stated, and whose cases are now before the Court, did not belong to either of the corps mentioned; and in referring to that article as one of the motives for giving the grants only intended to indicate the royal sanction to gifts of lands to soldiers for their fidelity in the recent insurrection.

It does not say that his Majesty forbids his governors to grant to any other portion of his loyal and faithful subjects; it does not limit the quantity, nor indicate the royal will that no larger quantity shall be given to those who suffered losses, advanced money, or rendered distinguished services. The recitation therefore in these grants that, "whereas his Majesty has been pleased to grant the favours and gratifications proposed by Governor Kinderlan' to certain officers and soldiers, in land, does not change that pre-existing power under the laws of Spain, nor confine it to that class of subjects alone."

It will not be denied that those embraced by the royal order, are restrict- by its provisions, and that they are entitled to no more land, than the order authorizes to be granted to them.

Now, if the learned counsel is correct in his conclusions, what an unparelled instance of injustice and inconsistency is presented by the Royal order of 1815! The claimants under the provisions of that order are admitted not to be embraced by the same, and it is, therefore, contended that they are not restricted to the quantity which the order authorises to be granted for military services. It is further argued, that the Governor had unlimited power before the date of the order, although no such power has been shown, and yet he has requested grants to be made to the gallant officers and soldiers who served in a protracted and harrassing seige, for a few acres of land only, when, without the order, he might in his own discretion have rewarded each, according to his merit, by giving him such quantity of land as he thought proper. The natural conclusion resulting from these erroneous premises, is, that in consequence of the fidelity, galantry, and patriotism of those who rendered important services during the seige, the Governor made a suggestion by which his power to reward them was restricted; and that they are, therefore entitled to a less reward than others who rendered less important services. This proposition, we think, involves an absolute absurdity, and cannot be sustained by the Court. It is evident there was no power vested in the Governor before the date of the royal order of 1815 to grant lands for military services. If that unlimited power existed before, why should it have been restricted? Why should the soldiers of the three companies of militia of the City of St. Augustine, and the married officers and soldiers of the Third Batalion of Cuba, by royal order, be denied the same reward, which, it is contended the Governor had power, both before and after the order, to bestow on others; particularly when the order professes to grant a reward for their fidelity, and not to deprive them of a bounty to which before the date of the under they might have received under the power of the Governor?

R. K. CALL.